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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1980

No.

ROBERT BORIS BEACHBOARD *Appellant,*

v.

COLUMBIA UNIVERSITY *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

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Appellant
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Fort Lauderdale, Florida
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v.

COLUMBIA UNIVERSITY *Appellee.*

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JURISDICTIONAL STATEMENT.

QUESTION PRESENTED

Can the Court of Appeals of the State of New York act upon a court rule which has not been made effective as mandated by legislative statute through requisite publication?

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6/24/80, order entered 6/24/80	denial of permission by A.D. to appeal to the N.Y.S.C.A.	N.Y.L.J., June 26, 1980, at p. 4, col. 4M
4/22/80, order entered 4/22/80	grant by A.D. of cross motion to dismiss appeal	N.Y.L.J., April 24, 1980, at p. 7, col. 3M
4/22/80, order entered 4/22/80	denial by A.D. of discovery motion	N.Y.L.J., April 24, 1980, at p. 7, col. 3T
2/14/80, order entered 2/14/80	denial by A.D. of permission to appeal to A.D.	N.Y.L.J., Feb. 19, 1980, at p. 14, col. 2T
12/7/79, order entered 12/10/79	referral to J. Stecher	N.Y.L.J., Dec. 13, 1979, at p. 10, col. 3B
4/22/80, order entered 4/25/80	denial of motion to dismiss proceeding	N.Y.L.J., April 29, 1980, at p. 5, col. 2M

4/22/80, decision entered 4/25/80 (Appendix B)	denial of motion to dismiss proceeding	N.Y.L.J., April 29, 1980, at p. 5, col. 2M
4/22/80, order entered 11/7/79 and 4/25/80	referral to J. Stecher	N.Y.L.J., Nov. 13, 1979, at p. 14, col. 2T and April 29, 1980, at p. 5, col. 2T
4/22/80, decision entered 4/25/80 (Appendix C)	denial of motion to withdraw a motion	N.Y.L.J., April 29, 1980, at p. 5, col. 2T
1/22/80, order entered 11/26/80 and 1/23/80	referral to J. Stecher and denial of permission to appeal Article 78 proceeding to A.D.	N.Y.L.J., Nov. 29, 1979, at p. 10, col. 3B and Jan. 28, 1980, at p. 7, col. 2B
1/22/80, order entered 11/26/80 and 1/23/80	referral to J. Stecher and denial of permission to appeal to A.D. motion for various letters	N.Y.L.J., Nov. 29, 1979, at p. 10, col. 3B and Jan. 28, 1980, at p. 7, col. 2B

1/22/80, order entered 11/26/80 and 1/23/80	referral to J. Stecher and denial of permission to appeal discovery motions to A.D.	N.Y.L.J., Nov. 29, 1979, at p. 10, col. 3B and Jan. 28, 1980, at p. 7, col. 2B
1/22/80, decision, entered 1/23/80 (Appendix D)	denial of permission to appeal any order to A.D.	N.Y.L.J., Jan. 28, 1980, at p. 7, col., 2B
12/5/79, judgment entered 12/5/80 (Appendix E)	dismissal of proceeding except portion concerning medical malpractice	N.Y.L.J., Dec. 10, 1979, at p. 12, col. 4M
10/15/79, order entered 9/26/79 and 10/18/79	referral to J. Stecher and denial of permission to amend petition	N.Y.L.J., Sep. 28, 1979 at p. 5, col. 4T and Oct. 23, 1979 at p. 6, col. 3T
10/15/79, decision entered 10/18/79 (Appendix F)	denial of permission to amend petition	N.Y.L.J., Oct. 23, 1979, at p. 6, col. 3T

10/12/79, order entered 9/10/79 and 10/15/79	referral to J. Stecher and dismissal of proceeding	N.Y.L.J., Sep. 12, 1979, at p. 10, col. 1M and Oct. 18, 1979, at p. 6, col. 2B
10/12/79, order entered 9/10/79 and 10/15/79	referral to J. Stecher and denial of motion for various letters	N.Y.L.J., Sep. 12, 1979, at p. 10, col. 1M and Oct. 18, 1979, at p. 6, col. 2B
10/12/79, order entered 9/10/79 and 10/15/79	referral to J. Stecher and denial of discovery motion	N.Y.L.J., Sep. 12, 1979, at p. 10, col. 1M and Oct. 18, 1979, at p. 6, col. 2B
10/12/79, decision entered 10/15/79 (Appendix G)	dismissal of proceeding and denial of all motions	N.Y.L.J., Oct. 18, 1979, at p. 6, col. 2B
10/12/79, order entered 10/3/79 [and 10/15/79]	referral to J. Stecher and denial of discovery motion	N.Y.L.J., Oct. 5, 1979, at p. 5, col. 1T and [N.Y.L.J., Oct. 18, 1979, at p. 6, col. 2B]

10/12/79, decision entered 10/15/79 (Appendix H)	denial of discovery motion	N.Y.L.J., Oct. 18, 1979, at p. 6, col. 2B (?)
11/25/80, order entered 11/25/80 (Appendix I)	denial of motion to vacate 9/16/80 order of N.Y.S.C.A.	N.Y.L.J., Nov. 28, 1980, at p. 17, col. 2T

GROUNDS OF JURISDICTION OF THIS COURT

Nature of this Appeal

This appeal is from a final order of the Court of Appeals of the State of New York denying a motion to vacate an earlier order made and entered on September 16, 1980 (Appendix A) which dismissed an appeal brought to the Court of Appeals sua sponte upon the grounds of insubstantial constitutional question. At issue herein is the constitutionality of rule 500.2 of said court and thus 28 U.S.C. § 2403 (b) is applicable.

Order Being Appealed

The order being appealed (Appendix I) was made and entered on November 25, 1980. A notice of appeal from this order was served on December 23, 1980 and was filed in the Court of Appeals of the State of

New York on or about December 26, 1980.

Jurisdictional Provisions

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257 (2). Central Hudson Gas & Electric v. Public Service Commission, ___ U.S. ___, 100 S.Ct. 2343 rev'g 390 N.E.2d 749, 417 N.Y.Supp.2d 30, 47 N.Y.2d 94 aff'g 407 N.Y.Supp.2d 735, 63 A.D.2d 364. Consolidated Edison Co. of N. Y. v. Public Service Commission, ___ U.S. ___, 100 S.Ct. 2326 rev'g 390 N.E.2d 749, 417 N.Y.Supp.2d 30, 47 N.Y.2d 94 aff'g 407 N.Y.Supp.2d 735, 63 A.D.2d 364 rev'g 402 N.Y.Supp.2d 551, 93 Misc.2d 313. Supreme Court of Virginia v. Consumers Union of the U. S., ___ U.S. ___, 100 S.Ct. 1967 rev'g 479 F.Supp. 1055 remanded from 433 U.S. 917 rev'g 427 F.Supp. 506. In re Primus, 436 U.S. 412 rev'g 233 S.E.2d 301, 268 S.C. 259.

ELEMENTS OF LAW INVOLVED

N. Y. Judiciary Law § 52

General rule or order of court of appeals must be published. - A general rule or order of the court of appeals does not take effect until it has been published in the state bulletin referred to in section eighty-two of the executive law.

N. Y. Judiciary Law § 51

Court of appeals may make rules of practice for its court. - The court of appeals may from time to time adopt, amend, or rescind rules, not inconsistent with the constitution or statutes of the state, regulating the practice and proceedings in the court.

N. Y. Court of Appeals Order

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany

October A. D.
1976.

Present, Hon. Charles D. Breitel,
Chief Judge, presiding.

In the Matter of the Revision :
and Amendment of the Rules of
Practice of the Court of Appeals :
of the State of New York

In pursuance of section 51 of the Judiciary Law it is hereby

ORDERED that the Rules of Practice of the Court of Appeals (22 NYCRR Part 500) be revised and amended, effective January 1, 1977 or as soon thereafter as section 52 of the Judiciary Law is complied with, to read as follows:

. . . . .

Rule 500.2 Filing and Service of Appellant's Jurisdictional Statement.

Within 10 days from the time the appeal is taken, appellant shall file with the clerk one copy of a statement giving the reasons for and the case, statutory, or other authority supporting the assertion that this court has jurisdiction to entertain the appeal and to review the questions raised. The statement shall recite (1) the title of the case, (2) the court from which the appeal is taken, (3) the date of service of the

notice of appeal or the date of entry of the order granting leave to appeal, (4) the date and type of service upon the appellant of the order or judgment appealed from and notice of entry thereof and (5) the name and address of the attorney for respondent. There shall be filed with the statement a legible copy of the dated notice of appeal, or the order, if any, granting leave to appeal, the order, judgment or determination appealed from, any other order brought up for review, the opinion or memorandum of the Appellate Division or other intermediate appellate court, the order, judgment or determination reviewed by the Appellate Division or other intermediate appellate court, and the formal or informal findings and conclusions upon which such order, judgment or determination was entered. Where a party will assert that a statute is unconstitutional, notice of this assertion shall be given to the Attorney General in writing at the time of filing this jurisdictional statement and a certification to such effect shall be included in this statement. An appeal shall not be deemed perfected until the filing of this statement and simultaneously with such filing appellant shall serve counsel for all parties with a full set of the papers required by this section.

The court may determine, sua sponte, whether it has subject matter jurisdiction and power to review based on the papers submitted in accordance with this section.

. . . .

IN WITNESS WHEREOF, the Honorable Charles D. Breitel, Chief Judge of the said Court of Appeals, and the undersigned Associate Judges of the said Court, constituting a majority of the Judges thereof, have subscribed their names and caused the seal of the said Court of Appeals to be affixed hereunto, this ... day of October in the year of our Lord one thousand nine hundred and seventy six.

/s/
Charles D. Breitel, Chief Judge

/s/
Matthew J. Jasen

/s/
Domenick L. Gabrielli

/s/
Hugh R. Jones

/s/
Sol Wachtler

/s/
Jacob D. Fuchsberg

/s/
Bernard S. Meyer

SEAL

Attest: /s/ Joseph W. Bellacosa
Clerk of the Court of
Appeals

Filed: October 25, 1976

U. S. Constitution,

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..

STATEMENT OF ISSUE

In October 1976 the Court of Appeals of New York made an order pursuant to N. Y. Jud. Law § 51 modifying its rules. As is stated in the order itself, as well as in N. Y. Jud. Law § 52, the proposed rules do not go into effect until published in the New York State Bulletin. They have not yet been published in the New York State Bulletin or in its successor the New York State Register.

On June 24, 1980 the Supreme Court of the State of New York, Appellate Division, First Department made an order denying permission to the appellant herein to appeal to the Court of Appeals of New York. This order was served on the appellant by the appellee with notice of its entry on June 30, 1980. Intending to make another motion at the Court of Appeals for permission for leave to appeal, the appellant on July 8, 1980 served on

the appellee and on the Court of Appeals a jurisdictional statement made in conformity with the proposed rule 500.2. Then by letter dated July 15, 1980 the clerk of the Court of Appeals, Joseph W. Bellacosa, wrote to the appellant:

> I acknowledge receipt of your 500.2 jurisdictional statement ....
>
> The Court may examine its subject matter jurisdiction sua sponte, with respect to whether the order appealed from is final (CPLR 5601). ...
>
> [I]f you wish to persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your advesary is likewise afforded this opportunity.

By invitation of said clerk the appellant responded to the issue regarding finality by a one page letter dated July 31, 1980 which justified the finality of the order in question by citing "Reynolds vs. Cropsey, 241 N.Y. 389 in which an order of the Appellate Division of the Second Judicial

Department denying as a matter of law a motion for a writ of prohibition was deemed final" and "David Johnson, by his guardian, Walter Johnson, et al. vs. Yeshiva University et al.; Yeshiva University et al. vs. City of New York, 53 A.D.2d 523 (1st J.D. 1976) in which the Appellate Division order dismissing the fi[r]st six causes of the complaint was similarly determined to be final." Appellant has not received a reply to this letter from either the appellee or from the clerk although it was served on both. On September 15, 1980 the appellant sent to the Court of Appeals twenty copies of his brief and appendix to be heard in his appeal by ordinary mail. Then, on September 16, 1980, the court dismissed the appeal sua sponte upon the grounds that it did not involve constitutional issues.

On November 10, 1980 the appellant

made a motion to have the sua sponte order vacated since the rule under the authority of which it had been made had not been published pursuant to N. Y. Jud. Law § 52. This motion was denied by order dated November 25, 1980.

The appellants appeal to the Court of Appeals was dismissed on the merits without an adequate hearing.

SUBSTANTIALITY OF FEDERAL QUESTIONS

Jurisdiction over state courts of highest resort is only had by the United States Supreme Court. When a rule of such a lower court is clearly beyond the bounds of legislative authority and when it infringes on rights constitutionally guaranteed it is proper and just that an appeal be taken to this Court. The case Herring v. New York, 422 U.S. 853 rev'g 351 N.Y.Supp.2d 368, 43 A.D.2d 816 (1st Dpt.), is seen as being significant in these terms. Appeal to the U. S. Supreme Court invalidated a rule of procedure, N. Y. Crim. Proc. Law § 320.20 (3) (c) (1971), upon the grounds that it prohibited sufficient hearing. Appeal to the New York Court of Appeals was denied. The situation in the proceeding under discussion has been heard to an even lesser extent than was the Herring case the

dismissal of which in the New York Court of Appeals is unreported. That same court dismissed this proceeding submitted to it without considering the brief and appendix which were essential to any proper consideration of the matter. It was not dismissed on any procedural point but was rather dismissed "upon the ground that no substantial constitutional question is directly involved." Presently what is important is the affirmation of the need to inforce publication requirements. This is necessary not only in regards to effective promulgation but also is needed to insure the maintenance of proper procedure. The rule by which the Albany court dismissed the case brought to it by the appellant herein was not duly published as prescribed by legislation and as a result has not as of yet taken effect.

Initially it is necessary to make a

fundamental distinction between two types of publication laws regarding statutes and regulations. The type which includes the law under discussion presently, New York Judicialy Law § 52, states imperatively that a rule or statute will not go into effect until a certain date. In this case it is on the day of the first publication in the New York State Register. The second type does not consider the date of effectiveness for the relevant regulation or law but states only that it shall be published. Such is the case with the federal Adminstrative Procedure Act publication requirements. In general the absence of direction for the date of effectiveness renders a publication law weaker in terms of its enforcement in regards to publication, and so in the present case it is not proper to make close analogy with the APA, however it is still seen as being relevant. An opinion of the

Supreme Court of Delaware takes note of the problem. Empire Box Corp. v. Jefferson Island Salt Min. Co., 31 A.2d 240, 243, 3 Terry 258 and 36 A.2d 40, 3 Terry 432 aff'g 23 A.d 106, 2 Terry 386, also 24 A.2d 106, 2 Terry 409:

> [F]airness to the Bar and to litigants, represented by its members, seems to require some action, tending to give notice of the adoption of Rules of Court.... In that respect, they usually differ from statutes, duly enacted and approved, which require no action in the nature of promulgation to make them effective.

In the U. S. Supreme Court date of effect of a court rule is of principal concern in In re Isserman, 348 U.S. 1.[1]

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[1] 348 U.S. 1, 75 S.Ct. 6, 99 L. 3 (1954)
345 U.S. 286, 73 S.Ct. 676, 97 L. 1013
72 S.Ct. 1065, 96 L. 1391
reh.den. 343 U.S. 931, 72 S.Ct. 756, 96 L. 1341
343 U.S. 1, 72 S.Ct. 451, 96 L. 717
reh.den. 342 U.S. 858, 72 S.Ct. 84, 96 L. 646
crt.den. 341 U.S. 952, 71 S.Ct. 1010, 95 L. 1374
182 F.2d 416
9 F.R.D. 394 (S.D.N.Y. 1949)

Under an early Rule 2, par. 5, of this Court's rules Isserman was disbarred but upon subsequent modification of the rule

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See also:
172 A.2d 425, 35 N.J. 198 (1961)
crt.den. 345 U.S. 927, 73 S.Ct. 706, 97 L. 1357
88 A.2d 199, 9 N.J. 316
87 A.2d 903, 9 N.J. 269 (1952)

And see also:
reh.den. 355 U.S. 936, 78 S.Ct. 409, 2 L.2d 419 (1958)
reh.den. 342 U.S. 842, 72 S.Ct. 20, 96 L. 636
341 U.S. 494, 71 S.Ct. 857, 95 L. 1137
340 U.S. 887, 71 S.Ct. 133, 95 L. 630
crt.gr. 340 U.S. 863, 71 S.Ct. 91, 95 L. 630
184 F.2d 280 (C.A.N.Y. 1950)

And also:
355 U.S. 939, 78 S.Ct. 409, 2 L.2d 419 (1958)
reh.den. 342 U.S. 842, 72 S.Ct. 20, 96 L. 636
341 U.S. 494, 71 S.Ct. 857, 95 L. 1137
340 U.S. 887, 71 S.Ct. 113, 95 L. 630
crt.gr. 340 U.S. 863, 71 S.Ct. 91, 95 L. 630
184 F.2d 201 (C.A.N.Y. 1950)

Also:
crt.den. 338 U.S. 851, 70 S.Ct. 91, 94 L. 521 (1949)
176 F.2d 169
176 F.2d 78
9 F.R.D. 367
83 F.Supp. 197
crt.den. 335 U.S. 909, 69 S.Ct. 412, 93 L. 442
81 F.Supp. 280
80 F.Supp. 479
79 F.Supp. 422 (S.D.N.Y. 1948)

he was reinstated. Also Will v. U. S., 389 U.S. 90, 99, n. 7: "Petitioner's order was entered before the amendment was promulgated." Court rules are neither truly prospective or retrospective in their operation. It cannot be maintained arguendo that if the challenged rule is properly promulgated and made effective this will in itself make good the relevant decision made prior to such publication. Conversely it should not be maintained that after the proper promulgation of the rule it cannot be made effective on this case in that this case was commenced prior to its publication. The rule takes effect on the first day it is properly published and does not have ex post facto authority. N. Y. Jud. Law § 52.

An early case in which official publication date was crucially important is Mc Clure v. Oxford, 94 U.S. 429, 432-

433. Chief Justice Waite determined:

> The statute under which the bonds now in question were issued, and which is referred to in the bonds, though passed and approved March 1, 1872, was not by its terms to go into effect until after its publication in the "Kansas Weekly Commonwealth." Of this every purchaser of the bonds had notice, because it was part of the statute he was bound to take notice of.
>
> . . . .
>
> No valid notice of an election could be given until the act went into effect, because until then no officer of the township had authority to designate the time or place of holding it. These bonds, therefore, carried upon their face unmistakable evidence that the forms of law under which they purported to have been issued had not been complied with, because thirty days had not elapsed between the time the law took effect and the date of the election.

Although a more recent case, Panama v. Ryan, 293 U.S. 388, 408-409 and 412-413 rev'g 71 F.2d 1 and 71 F.2d 8 rev'g 5 F.Supp. 639, also 5 F.Supp. 633, is known more for its concern with

presidential authority, publication is still the key in its determination:

> On August 19, 1933, the President, by Executive Order No. 6256... approved a "Code of Fair Competition for the Petroleum Industry."
>
> . . . .
>
> [T]he controversy with respect to the provisions of section 4 of article III of the Petroleum Code was initiated and proceeded in the courts below upon a false assumption. That assumption was that this section contained the paragraph (eliminated by the Executive Order of September 13, 1933) .... Section 4 of article III concerning oil production was divided into two paragraphs. This section was amended by Executive Order No. 6284-a of September 13, 1933 which read "Section 4 of Article III is amended to read as follows ...." The second paragraph was thereby eliminated.

The facts upon which the case is based occured after September 13, 1933, and as a result the government announced

> that, by reason of the elimination of this paragraph, the government "cannot, and therefore it does not intend to, prosecute petitioners

> or other producers of oil in Texas, criminally or otherwise, for exceeding at any time prior to September 25, 1934, the quotas of production assigned to them under the laws of Texas....

Further commentary on the legal aspects is found in Robert A. Jackson, The Struggle for Judicial Supremacy (New York: Alfred A. Knopf, 1941), pp. 90-91:

> One of the Government lawyers, in preparing the Government's brief, took the precaution of examining the original of the President's Executive Orders promulgating and amending the code. It was the time-honored practice for Executive Orders to be deposited with the State Department. ... The meticulous Government lawyer who was interested in checking the punctuation in the original against that in the version distributed by the Interior Department made a [the] discovery. ... At the argument, counsel for the Government was subjected to a raking fire of criticism from the bench because of the failure of the Government to publish Executive Orders in official and easily obtainable form. This would presumably have led to an earlier discovery of the error in draftsmanship.

The error and its correction are very significant for the foundation of the Federal Register which had a counterpart in New York State, the New York State Bulletin which was superseded in 1979 by the New York State Register, essentially the same in function. New York State L. 1978, ch. 648 § 7: "Any reference in law to the State bulletin, state paper, or state advertising bulletin shall hereafter be deemed to mean the state register for all purposes."

A mistake of a similar sort was found in U. S. v. Shafer, 132 F.Supp. 659, 667 (D. Maryland):

> The findings of the secretary, as published in 19 F.R. 3863, were that the total supply of wheat for the marketing year 1954-55 was 1,093 million bushels.... [T]he Federal Register published at 19 F.R. 4058 a correction indicating that the figure 1,093 million should have been 1,903 million.

The Federal Register is not compelled to publish a correction even though a printing mistake is adverse to the particular agency which made the correct version. Printing errors in official legislative or adminstrative publications can be rectified by only two means, amendment or reprinted correction. The law as it stands in official form is the law, and mistakes per se are not recognized.

The New York State Court of Appeals is obliged to take judicial notice of the officially produced New York State Bulletin with its lacuna, the absence of the relevant amendment to the court rule in discussion here, even though the amendment is published in other locations. Espinal v. Judge Bayer, 246 N.Y.Supp.2d 107, 109, 41 Misc.2d 429: "[I]t is not the function of this court to pass on whether the position taken by the State Department

[which produced the New York State Bulletin] is logical or illogical." It cites In re Biaz, 135 U.S. 403. Browne v. City of New York, 211 N.Y.Supp. 306, 330, 213 A.D. 206 aff'd 149 N.E. 211, 241 N.Y. 96 rev'g 210 N.Y.Supp 786, 125 Misc. 1 (Sup., N.Y., Sp. Term, Part I): "The journals of the Assembly and Senate for 1922 are public records of which the court will take judicial notice." In Auerbach v. Stein, 293 N.Y.Supp. 545, 162 Misc. 102 (A.T., 1st Dpt.), an almanac was judicially recognized. Generally any official document or record produced by a state will be judicially noticed by that state. Sarnac Land & Timber Co. v. Roberts, 101 N.E. 898, 901, 208 N.Y. 288 rev'g 137 N.Y.Supp. 114, 152 A.D. 918:

> It was made the duty of the town clerk to receive, file, and record the description of the school districts and neighborhoods and all papers and proceedings delivered to

> him by the school commissioner. The record of school districts boundaries made by the town clerk imports verity perforce of his official duty to make it.

Rankendorff v. Taylor, 29 U.S. 349 - tax rocords. Jackson v. U.S., 230 U.S. 1, 18 aff'g 48 Ct.Cl. 514 - official reports. Eleanor Edwards was in 1976 the editor in the Office of Communications and Publications in the Department of State of the State of New York. It was under her auspices that the publication known as the New York State Bulletin was compiled at that time. No matter what the cause of the error resulting in the ommission of the court rule in question from said publication may be, the fact remains that it has not been published as required and has not yet taken effect. The ommission of the rule is a true fact and the 1976 compilations of the Bulletin are true and accurate by definition in as much as it was Edwards'

official duty to compile them. The court is bound to take judicial notice not only of the Bulletin itself but also of the ommission from the Bulletin of the court rule. Its absence cannot be ignored.

In terms of facts in the complaint a case very close to the case at hand is York v. State ex rel. Schwaid, 10 So.2d 813, 814-815, 152 Fla. 285, reh'g den., in which a writ of mandamus was issued requiring the Board of Dental Examiners to issue to Schwaid a certificate to practice dentistry. The Supreme Court of Florida held:

> Adminstrative regulations are binding on those affected by them only when promulgated in due course. They will not be permitted to be used in an ex post fact manner as charged in this case.
>
> . . . .
>
> [A]ppelle grounded his claim to a certificate on the allegation ... that he was deliberately "flunked" on account of prejudice and caprice of appellants.

...

There is no question about the moral and educational qualification of the applicant in this case. He is shown to be a man of high moral and professional integrity, an honor graduate from one of the most reputable dental colleges in the country, has practiced dentistry since 1917 in the State of New York, having enjoyed a splendid clientele. ...

... It is ... contended that the appellee was given no credit for answers to questions in embryology and histology, that appellee was treated unfairly as to one very difficult question on his theoretical examination, that the tally sheets and other data made from the examination were juggled and refused appellee and that some of the examination papers could not be produced notwithstanding the law requires that they be kept on hand for a period of two years.

. . . .

[T]he court below found that appellee was in every way qualified to practice dentistry in the State of Florida, that he did in fact make a passing mark on his examination, that he is entitled to have a certificate issued to him, that appellants did capriciously and arbitrarily "flunk" appellee and that they illegally, capriciously, and arbitrarily

refused to issue him a certificate.

In terms of points of law there are several cases which cover the issue present. In re Ames, 85 P.2d 1014, 1015-1016, 59 Nev. 110:

> Rule II as amended pursuant to a resolution [was] adopted by said [the] Bar on August 1, 1936, and [was] approved by the Supreme Court on September 21, 1936....
>
> . . . .
>
> The defendant ... testified that he did not know of the amendment of Rule II, in question, until it appeared in the Bar Journal for January, 1937.
>
> . . . .
>
> ... Section 8377, N.C.L., authorizes the Supreme Court to adopt rules which shall be effective only after publication.

Smith v. Lee, 10 Nev. 208, 211:

> It appears that the practice referred to is not established by any rule formally recorded in the minutes of the court and published as other rules of that court have been. And courts are not allowed to enforce rules of their own making until thirty days after their adoption and puplication. (1 Comp.L., Sec. 930.)

The cited law reads: "Each District Court shall have power to make rules ... for its own government and the government of its officers; but such rules shall not be in force until thirty days after their adoption and publication...." In re Maxwell, 14 N.Y.Supp. 658, revolves around the publication of a rule which involves two publication laws, one is a predecessor of the current New York Judiciary Law § 52 at issue herein and is very similar in its terms and the other is a law which does not contain a provision for an effective date:

> Section 18 declares that a general rule of the court of appeals does not take effect until it has been published in the state paper for three weeks. But there is no similar provision in section 57. Therefore we think that the requirements of that section are only directory.

The importance of official publication in New York is emphasized by the New York State Penal Law § 1869 (1881) which has been encorporated in the current

§ 195.00 (2) (1965) reads:

> A county clerk who willfully omits to publish any statement required by law, within the time presecribed, is guilty of a misdemeanor, punishable by a fine of one hundred dollars, or imprisonment for six months, or both.

The New York State Court of Appeals in People v. Thorn, 50 N.E. 947, 951, 156 N.Y. 286, 47 N.Y.Supp. 46, 21 Misc. 130 (N.Y. Co.), refused to recognize a trial relocation and the trial based thereon upon the basis of C.C.P. § 40 which reads in pertinent part:

> [T]he judge ... may, by order, direct the term to be held at another place, designated by him, within the district for which it is to be held. The order must be forthwith ... published in such newspapers, and for such a time, as the judge directs therein....

The same ruling was made in People v. Pisano, 127 N.Y.Supp. 204, 209, 142 A.D. 24 (2d Dpt.) based on the similar provision in Judiciary Law § 9 (1909).

Thus because of improper publication the Court of Appeals is not justified in dismissing a case sua sponte on constitutional grounds just as the courts in Thorn and Pisano cases were not justified in moving the location of trial.

Similar to Jud. Law § 52 is found Jud. Law § 95 (192:) which conerns rules of civil practice: "A rule ... does not take effect, until it has been filed in the office of the secretary of state and by him published in the state paper ...." Commentary on this statute is found in 1932 Op.Att.Gen. 190, 191 and 192:

> [T]here is not much room for doubt of a legislative intention that such rules should be published in the state advertising bulletin. ... I advise you that rules or amendments ... take effect when filed in the office of the Secretary of State and published in one issue of the state advertising bulletin. [Italicization added.]

The enforcement of the law in

question, Jud. Law § 52, can easily be upheld by examining publication regulations involving less significant operations. If publication is necessary for the effectiveness of local regulations and ordinances it should be even more necessary for the effectiveness of regulations of the Court of Appeals in Albany. Benigno v. Cohalan, 357 N.E.2d 1001, 389 N.Y.Supp.2d 346, 40 N.Y.2d 880 aff'g 373 N.Y.Supp.2d 180, 49 A.D.2d 871 mod'g N.Y.L.J., June 14, 1974, at p. 20, col. 1M, in which the court held:

> As noted by the Appellate Division, in consequence of failure of publication as required by section 265 of the Town Law, the zoning resolution dated November 11, 1971 never became effective.

People v. Harris Foodlines, 372 N.Y.Supp.2d 365, 369, 83 Misc.2d 309:

> [N]o rule or regulation adopted by the Department of Agriculture and Markets has the effect of law unless published in the State Bulletin (Section 19,

Agriculture and Markets Law.)

The law at issue did not have a date of effectiveness provision dependent on publication for any "rule or regulation."

Also 1927 Op.Att.Gen. 302, 304:

> It is therefore my opinion that the departmental rules of the Department of Agriculture and Markets, and their amendment or repeal, must be published [in the "state paper"] as prescribed by section 25, to have the force of law.

Barry v. Town of Glenville, 171 N.E.2d 907, 209 N.Y.Supp.2d 834, 8 N.Y.2d 1153 aff'g 192 N.Y.Supp.2d 845, 9 A.D.2d 822:

> [T]he testimony indicates failure to comply with the requirements of section 264 of the Town Law, Consol.Laws, c. 62, regarding posting and publication of the original districting of the area in 1951. For this reason the judgment appealed from should be affirmed....

1972 Op.Att.Gen. 244, 248 relying on the above cited Town Law § 264 and the Barry case reads:

> ... I conclude that where the Town of Schroon adopted a zoning ordinance and subdivision regulations controlling land use and development prior to July 1, 1971 but the 10-day period after publication had not expired on or before July 1, 1971, such ordinance was not in effect on July 1, 1971 and was, therefore, ineffectual for the purpose of exempting the Town of Schroon from interim development controls ....

The Court of Appeals in Seafire v. Ackerson, 98 N.E.2d 478, 302 N.Y. 668 aff'g 87 N.Y.Supp.2d 438, 275 A.D. 717 aff'g 76 N.Y.Supp.2d 805, 193 Misc. 965, N.Y.L.J., Dec. 3, 1947, at p. 1584, col. 4F:

> The plaintiff .. claimed that the tax sale for non-payment of 1940-41 taxes was defective because of the failure of the receiver of taxes to publish and post notices required by Section 22 of the Suffolk County Tax Act, Laws 1920, c. 311, as amended by Laws 1931, c. 187, § 6.
>
> ... The court was also of the opinion that the statute requiring the receiver of taxes to publish and post notices of time and place for payment of taxes is mandatory....

The law at issue did not include a date

of effectiveness provision for the notice. This same court in Village of Williston Park v. Israel, 95 N.E.2d 208, 209, 301 N.Y. 713 aff'g 94 N.Y.Supp.2d 921, 276 A.D. 968, appeal den. 95 N.Y.Supp.2d 602, 276 A.D. 1013, also aff'g 76 N.Y.Supp.2d 605, 191 Misc. 6, N.Y.L.J., Jan. 27, 1948, at p. 345, col. 3M:

> [T]he defendants alleged that the zoning ordinance had never been duly ... published... and hence was invalid. The most serious of the claimed defects in the procedure leading to adoption of the ordinance was the omission of a copy of a zoning map ... and the failure to publish and post the map as a part of the resolution.
>
> The Special Term.... was of the opinion that the failures invalidated the ordinance.

The law relied upon, Village Law § 95, did not include a date of effectiveness provision dependent upon publication for any ordinance.

Municipal Home Rule Law § 27 (5) (1963 as amended) reads: "Local laws shall

be published annually by the secretary of state in a separate volume as a supplement to the session laws." Not withstanding this requirement we find that counties are also obliged to observe additional publication requirements found in County Law § 214 (2) (1950 as amended): "[T]he clerk of the board shall cause a true copy of each local law to be published in such official newspapers ...." 1972 Op.Att.Gen. 155. 1960 Op.Att.Gen. 98: "The new fire code must be published and posted in accordance with the provisions of section 133 of the Town Law." 1962 Op.Att.Gen. 258, 259: "[T]he Police Committee of the Board of Trustees before adopting traffic regulations must ... publish the regulations which it adopts pursuant to Village Law, §§ 90 and 95."

Concerning publication of notice requirements there are numerous cases in the Court of Appeals of New York. In re

Pennie, 15 N.E. 611, 614, 108 N.Y. 364:

> The Albany charter provides that, "for the purpose of receiving bids, the board shall meet ... at a time of which one week's notice shall have been given in the official papers...." ... [I]t affirmatively appears that, within two days after the last publication, the board met.... ... We cannot doubt that the act was mandatory, and required a substantial performance of its requirements, which was not done in this case. [W]e are not at liberty to say ... that the requirement of the law is unreasonable or unnecessary.

In the Matter of Burmeister, 76 N.Y. 174, 177 aff'g Sup., N.Y., Sp. Term. Eno v. Mayor, Aldermen and Commonalty of the City of New York, 68 N.Y. 214 rev'g Sup., N.Y., Sp. Term. In the Matter of Phillips, 60 N.Y. 16 aff'g Sup., N.Y., Sp. Term. Lennon v. Mayor, Aldermen and Commonalty of the City of New York, 55 N.Y. 361 aff'g Sup., N.Y., Sp. Term. In the Matter of Smith, 52 N.Y. 526 aff'g Sup., N.Y., Sp. Term. In the Matter of Astor, 50 N.Y. 363 rev'g Sup., N.Y., Sp. Term. In re Douglass, 46

N.Y. 42, 44 and 45 rev'g Sup., N.Y., Sp. Term:

> Laws of 1857, chap. 446... [:] "All resolutions ... shall be published... in all newspapers employed by the corporation, and shall not be passed until after notice has been published at least two days."
>
> . . . .
>
> When the proceedings for regulating sixty-fourth street were taken, there were four papers which had been designated, under the statute....
>
> ...
>
> The resolution ... was published, before its passage in but two of the designated papers. This was, we think, in plain violation of the statute.

The federal courts in New York have also enforced New York State publication requirements. Percy v. Brennan, 384 F.Supp. 800, 814 (S.D.N.Y.), a labor case involving minority civil rights:

> [D]efendants do not contest the fact that the letter [of the New York State Industrial Commissioner] was never published, the motion for summary judgment is granted, and the state defendants are enjoined from enforcing the terms of the letter without

meeting the necessary publication requirements."

Relied upon is New York Executive Law § 102 which did not have a date of effectiveness provision dependent on publication.

Enforcement of Publication Requirements of Laws and Regulations in Wisconsin

Wisconsin is the state which has placed perhaps the greatest emphasis on the proper promulgation and publication of the rules of its Supreme Court. There are particularly rigorous procedural formalities that it observes although there is not a provision for date of effectiveness dependent on publication. W.S.A. 751.12. Rules of court are thought to be similar to legislative enactments. Rules of Court Case, 236 N.W. 717, 204 Wis. 501. Mosing v. Hagen, 148 N.W.2d 93, 99, 33 Wis.2d 636: "This court has recognized that it

may suspend or modify rules of practice and procedure only after notice and hearing .... Notice of the hearing must be published." Rupp v. Travelers Indemnity, 115 N.W.2d 612, 616, 717 Wis.2d 16:

> In the process of invoking its rule making power, the court has customarily, at least recently, submitted the problem initially to the Judicial Council of Wisconsin for a study and report of the merits of a proposed change.

Ozaukee Finance v. Cedarburg Lime, 66 N.W.2d 686, 688, 268 Wis. 20. State v. Raminez, 265 N.W.2d 274, 277, 83 Wis.2d 150.

Strictness of publication requirements for statutes and regulations in general is seen in 10 O.A.G. 648, 656-657 which depends on Wis. Const. art. VII, § 21:

> It would seem that the constitutional purpose of giving the people of the state an opportunity to know with certainty what the law of Wisconsin is can be accomplished

> only by publishing that law in full, so that one who subscribes to the official state paper for the purpose of obtaining all the laws of the session, or a person who buys a copy of the session laws for the same purpose, will find all the law there without searching further. [P]rovision should be made, either in the bill itself or by joint resolution, for the publication in both the official state paper and the session laws ....

Clark v. Janesville, 10 Wis. 119, 143

reh'g 13 Wis. 463:

> I am compelled therefore, to hold that the charter of the city of Janesville was a general law within the meaning of this prohibition of the constitution, and that it could not be in force until published.

State ex rel. Cothren v. Lean, 9 Wis. 279.

Prospectiveness of Court Rules in Illinois

Rose v. Meyer, 18 N.E.2d 184, 370

Ill. 166, 185, also 25 N.E.2d 413, 303

Ill.App. 365:

> [T]his court has held that rules of court operate prospectively, only, and will not be given a

> retroactive interpretation so as to affect pending litigation. Owens v. Ranstead, 22 Ill. 161. The procedure in this appeal must be determined according to the rules in effect at the time judgment was entered in the trial court.

Henley v. Houck, 200 N.E.2d 99, 103 and 104, 49 Ill.App.2d 472, appeal den. 30 Ill.2d 626:

> ... Judge Dieringer had no authority, sui sponte, to consolidate these cases....
> ... All administrative rules of the Superior Court which existed prior to the effective date of the Uniform Rules for the Circuit Court and Superior Court of Cook County ... were still in effect at the time of the order of consolidation. ... Instead of moving for a consolidation of the cases before the chief justices of the Superior Court, Mildred Henley improperly presented her motion to Judge Dieringer. He had no power to consolidate the cases unless the moving party followed the procedure outlined in Section 1 of Rule 8 of the Superior Court Rules.

Importance of Publishing

Court Rules in Texas

Tinsley v. Bottom, 155 S.W. 1053, 1054, also 134 S.W. 833:

> [O]bjection is made to a consideration of the assignments of error, because they do not comply with rule 25, as amended by the Supreme Court January 24, 1912 (142 S. W. xii). [T]he assignments of error were filed February 19, 1912, and do not refer to the motion for new trial. At that time the amended rules referred to had not been officially or generally published; and for that reason... we have concluded to consider the case upon its merits.

Chief Justice Gaines in Fort Worth & D. C. Ry. v. Roberts, 81 S.W. 25, 26, 98 Tex. 42 rev'g 78 S.W. 1000. also 69 S.W. 985, 29 Tex.Civ.App. 566 and 83 S.W. 250, 37 Tex.Civ.App. 108:

> [W]e are of the opinion that the declaration of the court as to what its decision in future shall be should not be treated as having the force and effect of a regularly formulated and properly promulgated rule of practice.

Necessity of an Effective Order in the Implementation of a Procedural Rule of Pennsylvania

Gurzon v. H. J. Williams, 59 A.2d 140, 141, 359 Pa. 517:

> The lower court acted ... without any motion for judgment having been made and, merely, in connection with its overruling of questions of law raised by the plaintiff's reply to new matter of the affidavit of defense. All steps in the proceeding up to an including the entry of judgment were taken before January 1, 1947. Hence, the procedural rules pertinent were [only] those, in force prior to that date.

The defendant reiled upon two rules, 12 P.S. § 412 (not the similar § 431 discussed in the text), § 13 of the Practice Act of 1915 as amended by P.L. 140 of 1929 and presumably also on 12 P.S. § 731, P.L. 41 of 1889. The former law reads:

> In actions of trespass ... [t]he defendant ... may, by affidavit of defense ... set up against the plaintiff ... a claim for damages ... and both claims

> shall in the said cause be tried as one action.

Upon the authority of this enactment "new matter" was set up against the plaintiff. The plaintiff did not answer the new allegations but made a motion equivalent to a demurrer. The latter law reads:

> The courts ... may, by rule or standing order, authorize the prothonotary to enter judgment upon praecipe for want ... of an affidavit of defense, and to enter judgment thereon with the same effect as if moved for in open court.

From the opinion of the judge of the Supreme Court of Pennsylvania it is gathered that an entry of a judgment against the plaintiff was not consistent with the civil procedure enactments in force at the time it was made, but that it might not have been challenged if it had been entered on January 1, 1947 or afterwards at which time the former law was not effective, being replaced by certain "Rules of Civil Procedure" which

were enforced by an order of said court (345 Pa. xxiv) reading: "The Prothonotary of the Eastern District is ordered to make publication of these procedural rules ...." Rule 1047 thereof in contrast to the preceding § 731 reads: "The prothonotary, on praecipe of the plaintiff, shall enter judgment against a defendant by whom no ... pleading to the complaint is filed."

Publication Requirement of a Rule of Court of the Panama Canal Zone

Bruun v. Thorton, 2 Canal Zone 99: "The court rules now in force were not published until after appellant perfected his appeal."

The New York Court of Appeals should have heard the appeal brought to it from the Appellate Division of the Supreme Court of the State of New York, First Department.

Stoll v. First Nat. Bank of Independence, 132 S.W.2d 676, 677, 234 Mo.App. 364, also 134 S.W.2d 97, 345 Mo. 582:

> The purpose of our rules is to assist the court in the speedy disposition of cases coming before it, not to provide a method by which we may refuse to decide appeals on their merits.

The rule relied upon by the New York Court of Appeals in its sua sponte dismissal of the instant appeal on consitutional grounds does not have a date from which it is effective and is not in force. Phillips v. D. & J. Enterprises, 288 So.2d 137, 292 Ala. 31:

> This court has held that no statute has any force until it becomes the law of the land, and that is on the day fixed for it to go into effect. ... 172 So. 284. The same rule would apply to a rule of court procedure.

Each state has publication regulations. Although not every one of them has a requirement that court rules be published

in a certain fashion it is possible to find similar regulations being enforced even in courts of highest jurisdiction. E.g.: A statute requiring the publication of a county order, not dissimilar in nature to the rule modification order in question of the New York Court of Appeals, was enforced in Blackmore v. Duplin County, 159 S.E. 354, 201 N.C. 243. Duplin County officials failed to properly inform the public of an increase in a bond issue as presecribed by section 16 of the County Finance Act. The court found this defect to be fatal even though the original proposal had been published. And City of New Port v. Newport Nat. Bank, 146 S.W. 377, 379, 148 Ky. 213:

> While there are many cases holding that charter provisions with reference to the publication of ordinances are merely directory, such is not made the rule where publication is made a prerequisite to the ordinance taking effect.

The above-quoted passage of the Court of Appeals of Kentucky relies on Bybee v. Smith, 161 S.W. 15, 22 Ky.LawRep. 1684, also 57 S.W. 789, 22 Ky.LawRep. 467. Townsend v. Tallant, 33 Cal. 45, 51:

> [I]t was necessary to publish this order in the paper named for four successive weeks at least. It appears, however, that the notice was published in that paper for three weeks only - the fourth publication was in the California Courier.... [Proper] publication could not be dispensed with except in the event of personal service[etc.]....

National Bank of Commerce v. Town of Granada, 54 F. 100, 104-105 aff'g 48 F. 278 aff'g 44 F.262 rev'g 41 F. 87 (Cir. Ct., D. Col.):

> The provision of the act that such ordinances shall not take effect or be in force until they are published 'n the mode provided by the act is mandatory. This ordinance, never having been published, never went into effect.

Although regulations promulgated under the authority of the Adminstrative

Procedure Act are not subject to requirements for publication as rigorous as those governing the promulgation of the court rules of the New York Court of Appeals, there are many sources which indicate that proper publication of federal regulations is to be taken seriously. H.R.Rep.No. 1497, 89th Cong., 2d Sess. 5, rpt. [1966] U. S. Code Cong. & Ad. News 2418, 2422:

> Earlier this year the Foreign Operations and Government Information Subcommittee uncovered a serious violation of subsection (a) of 5 U.S.C. 1002 which requires every Governmental agency to publish its rules .... In spite of repeated demands, this clear legal requirement has been ignored by the Board of Review on Loss of Nationality in the Department of State, which has authority over questions of citizenship.

Other comments on S. 1160, 89th Cong. concerning publication of regulations and amending section 3 of the APA were

generally favorable. Adminstrative Procedure Act: Hearings Before the Subcomm. on Adminstrative Practice and Procedure of the Senate Comm. on the Judiciary on S. 1160 ..., 89th Cong., 1st Sess. 311, 312:

> "Statement of Dale W. Hardin, Manager, Transportation and Communications Department, Chamber of Commerce of the United States" ...
>
> We believe S. 1160 will help to make more effective the principles approved by the national chamber's members, and we are therefore glad to endorse it and to urge its enactment.

S.Rep.No. 813, 89th Cong., 1st Sess. 4 (on S. 1160):

> The new sanction imposed for failure to publish the matters enumerated in section 3(a) was added to expressly provide that a person shall not be adversely affected by matters required to be published and not so published. This gives added incentive to the agencies to publish the required material.

Attorney General's Memorandum on the

Public Information Section of the Adminstrative Procedure Act (G.P.O. 1967), p. 9:

> The new requirement that "rules of procedure' be published is ... merely a restatement of the previous requirement. However, both the Senate and House Committees found instances in which agencies had not issued necessary rules of practice and procedure, had not published rules which had been issued, and had not kept published rules up to date. Such deficiencies should be remedied.

The Attorney General of the U. S. also expressed a concern for the proper publication of regulations in regard to the original version of the APA. Report of the Attorney General's Committee on Adminstrative Procedure, S.Doc. 8, 77th Cong., 1st Sess. 25, rpt. (Charlottesville: University Press of Virginia, 1968), p. 25:

> Laymen and lawyers alike, accustomed to the traditional processes of legislation and adjudication, are baffled by a lack of published information to which they can turn when

> confronted with an adminstrative problem.

Quoted in the legislative history of the APA (Sen.Doc. 248, 79th Cong., 2d Sess.; G.P.O. 1947), p. 357 as well as in 92 Cong.Rec. 5650. Attorney General's Manual on the Adminstrative Procedure Act (Leavenworth, Ka.: Federal Prison Industries, 1947), rpt. I.C.C. Practitioner's Journal, vol. 15, no. 5, § 2 (1948), pp. 21-22:

> Should an agency fail to publish, for example, a listing of its field officers with their functions, persons who have not received actual notice of such agency organization may content that they are not bound to resort to a field office prior to institution of their case in central office.

There are several recent cases in this Court which involve the enforcement of the publication requirements of the APA. Perhaps the most important in these regards is N.L.R.B. v. Wyman-Gordon, 394 U.S. 759, 764 rev'g 397 F.2d 394 rev'g

270 F.Supp. 200 (D. Mass.):

> The rule-making provision of that Act, which the Board would avoid, were designed to assure fairness ... and mature consideration of rules of general application. They may not be avoided by the process of making rules in the course of adjudicatory proceedings ... The "rule" created in Excelsior was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted ....

Upon the principle formulated here it is just to conclude that a state court cannot dismiss a case on constitutional grounds without an adequate hearing if the procedure for such a process has not been promulgated in the legislatively prescribed manner. The need to properly promulgate rules concerning internal operations is also stressed in Morton v. Ruiz, 415 U.S. 199, 232 aff'g 462 F.2d 818 rev'g D. Ariz. The Department of State in Service v. Dulles, 354 U.S. 363, 382,

esp. n. 29, rev'g 235 F.2d 215, did not publish in the Federal Register certain regulations which it contended were violated by the petitioner. Although the Court did not make a determination regarding their validity it did find that the rules in question were not applicable.

One of the most recent cases involving the issue of federal publication of regulations is Rowell v. Andrus, 631 F.2d 699, 704 rev'g in part D. Utah: "Clearly 'publication' in the Federal Register requires more than mere 'filing.'" Second Circuit decisions on this issue generally favor the enforcement of APA publication requisites. Lewis-Mota v. Sec. of Labor, 469 F.2d 478, 481 rev'g 337 F.Supp. 1289 (S.D.N.Y.), involving an alien's challange of employment regulations for immigrants:

> The Directive suspending the said Schedule C precertification

> list was not in fact published in the Federal Register until almost a year after its issuance....

Percy v. Brennan, 384 F.Supp. 800, 813 (S.D.N.Y.). City of New York v. Diamond, 379 F.Supp. 503, 516 (S.D.N.Y.): "A plethora of cases hold that an administrative rule which is not promulgated in accordance with these procedures [5 U.S.C. 553] is void." Procedural rules were at issue in G. J. Howard Co. v. Cassidy, 162 F.Supp. 568, 574 (E.D.N.Y.).

"Student exemption" regulation was challenged by an alien and was subsequently annulled due to improper publication in Hou Ching Chow v. Attorney General, 362 F.Supp. 1288 (D.D.C.). Within the same circuit is found Ramer v. Saxbe, 522 F.2d 695, wherein prisioners successfully challenged imporperly published regulations and also Gonzalez v. Freeman, 334 F.2d 570.

Other circuits do not vary significantly in their interpretations. Anderson v. Butz, 550 F.2d 459 aff'g 428 F.Supp. 245 (E.D. Calif.), involving food stamp regulations challenged by four housewives. Hotch v. U.S., 212 F.2d 80 and 208 F.2d 244 rev'g 107 F.Supp. 159, involving a fisherman's challenge of fishing regulations even where he had knowledge of them. Regulatory agencies themselves though less willing to demand publication for validity of a regulation do however recognize the need for promulgation and proper publication. In the Matter of Advance Electronics, 21 F.C.C.2d 239, 241:

> [I]n view of the APA "sweeping prohibition" against unpublished rules, the Examiner held, it is apparent that an FCC rule prohibiting corporations to be represented by their officers is not now operative ....

State adminstrative laws are continually

changing and in general they are being brought into closer conformity with the federal APA. In these legislative reforms emphasis on proper promulgation in the enactment of regulations is usually increased. Judge Motley in Yaretsky v. Blum, 456 F.Supp. 653, 656-657 (S.D.N.Y.) aff'd 592 F.2d 65, declared certain memoranda issued by the New York State Department of Health to be "without legal effect" as a result of their improper promulgation under New York's SAPA (1976). The Commonwealth of Pennsylvania has recently enacted legislation more stringent in regard to the publication of court rules than those preexisting. 42 Pa.C.S.A. § 1702:

> [T]he Supreme Court and all agencies or units of the unified judicial system when exercising the power to adopt general rules ... shall be an agency within the meaning of the act of July 31, 1968 (P.L. 769, No. 240), known as the

> "Commonwealth Documents Law," .... All such general rules and orders shall be published pursuant to Part II of Title 45 ....

This section supercedes former 17 Pa.C.S.A. § 47. § 903 of Title 45 concerning the effective date of regulations pertinently directs:

> Publication shall be deemed to have been effected upon the deposit of the bulletin or the permanent supplement to the code containing such document in the United State mail for distribution.

As a result of improper publication certain regulations effecting schools and education were declared void under this new law. Community County Day School v. Commonwealth of Pennsylvania, Department of Education, 414 A.2d 428, ___ Pa.Cmwlth. ____. In the District of Columbia is found Rorie v. District of Columbia Department of Human Resources, 403 A.2d 1148, 1153:

> [T]he manual provision at issue

> in compliance with the DCAPA. ... The hearing officer who decided petitioner's case treated it as a binding rule and the Department directly affirmed his decision. Yet at neither time had the manual ever been published in the D.C. Register as required by D.C. Code 1978 Supp., § 1-1505(a).

In the Midwest there is Adams v. Professional Practices Commission, 524 P.2d 932, 933-934 and 935:

> Any rule and regulation of the commission is void unless filed and published in complaince with the act. ... Since no rules have been adopted by the PCC it has no authority to conduct a hearing until such time as the PPC has compiled with the Adminstrative Procedures Act.

The statute relied upon, 75 O.S. 1971 § 251, does not contain a date of effectiveness provision dependent upon publication. In the Northwest - Williams v. Idaho, 501 P.2d 203, 206. 95 Idaho 5:

> In order for an agency ruling or procedure to be given full force and effect... under the provisions of I.C. § 67-5205,

> the agency is required to "publish" all effective rules adopted by such agency.

The laws relied upon did not contain a date of effectiveness provision dependent upon publication.

The appellant herein has been denied procedural due process of the laws. The Court of Appeals of New York has dismissed an appeal brought to it without a proper hearing on constitutional grounds based on a court rule made effective without requisite publication, in contradiction to legislative mandate. A court rule thus applied is inoperative and in abrogation of duly enacted law. Alaska Packers Ass'n v. Pillsbury, 301 U.S. 174, 177 rev'g 85 F.2d 758 and 78 F.2d 587. A proper hearing by the New York court is required. Willner v. Committee on Character and Fitness, 373 U.S. 96, clarification den. 375 U.S. 950 rev'g 183 N.E.2d 86, 228

N.Y.Supp.2d 685, 11 N.Y.2d 931 aff'g 183 N.E.2d 86, 228 N.Y.Supp.2d 685, 11 N.Y.2d 866 aff'g 218 N.Y.Supp.2d 597, 13 A.D.2d 956, N.Y.L.J., June 30, 1961, at p. 6, col. 3M (1st Dpt.), involving admissions rules. Relevant also is Spevack v. Klein, 385 U.S. 511 rev'g 214 N.E.2d 373, 267 N.Y.Supp.2d 210, 17 N.Y.2d 490 aff'g 213 N.E.2d 457, 266 N.Y.Supp.2d 126, 16 N.Y.2d 1048, N.Y.L.J., July 21, 1965, at p. 9, col. 8M (2d Dpt.), involving a rule of the Supreme Court of the State of New York, Appellate Division, Second Department, Part 3, no. 4 (6).

CONCLUSION

The Court should note jurisdiction of this appeal from the order of the New York State Court of Appeals affirming the validity of rule 500.2 in that this regulation as enforced contravenes the

the Fourteenth Amendment to the Constitution of the United States.

Respectfully Submitted,

ROBERT BORIS BEACHBOARD

Appellant
6030 S.W. 8th Court
Fort Lauderdale
Florida
33317
Tel.: (303) 583-9318

Dated: February 23, 1981.

APPENDIXES

APPENDIX A

Order of Dismissal Sua Sponte Entered 9/16/80

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of September A. D. 1980

Present, Hon. Lawrence H. Cooke, Chief Judge, presiding.

Mo. No. 1017 SSD 101

In the Matter of Robert Boris Beachboard,

Appellant,

vs.

Columbia University,

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

/s/
Joseph W. Bellacosa
Clerk of the Court

SEAL

APPENDIX B

Decision Denying Motion to Dismiss Entered

4/25/80

SUPREME COURT : COUNTY OF NEW YORK
SPECIAL TERM : PART I

In the matter of the application of
ROBERT BORIS BEACHBOARD,
Petitioner,
for a judgment pursuant to Article 78,
of the Civil Practice Law and Rules,
-aginast-
COLUMBIA UNIVERSITY,
Respondent.

Index 12669/79

STECHER, J.:

Respondent's motion to dismiss the petition is denied as moot. There is no petition pending. The petition was disposed of by my decision dated October 15, 1979.

Dated: April 22, 1980 /s/ M.B.S. J.S.C.

APPENDIX C

Decision Denying Motion to Withdraw Motion

Entered 4/25/80

SUPREME COURT : COUNTY OF NEW YORK
SPECIAL TERM : PART I

In the matter of the application of
ROBERT BORIS BEACHBOARD,
Petitioner, :
for a judgment pursuant to Article 78
of the Civil Practice Law and Rules,
-against- :
COLUMBIA UNIVERSITY,
Respondent. :

Index 12669/79

STECHER, J.:

Petitioner's motion to "withdraw a motion for leave to serve a second amended petition" is denied as moot. All motions submitted to me in this case have been determined and there is no pending motion to withdraw.

Dated: April 22, 1980 /s/ M.B.S. J.S.C.

APPENDIX - D

Decision Denying Permission to Appeal any Order, Entered 1/23/80

SUPREME COURT : COUNTY OF NEW YORK
SPECIAL TERM : PART I

In the matter of the application of
ROBERT BORIS BEACHBOARD
on behalf of himself and all others :
similarly situated,
Petitioners, :
for a judgment pursuant to Article 78
of the Civil Practice Law and Rules :
-against-
COLUMBIA UNIVERSITY, :
Respondent.

Index 6329/79
12669/79

STECHER, J.:

Motions 123, 158, 159, 160 and 161 of November 16, 1979 are consolidated for purposes of disposition. Petitioner seeks "leave to appeal" any prior orders dated October 12, 1979 and October 15, 1979. Motions 123 and 161 are brought under index 6329/79 under which number petitioner commenced an Article 78 proceeding against respondent. Petitioner commenced a second

proceeding under index 12669/79 and motions 158, and 159 and 160 are brought in that proceeding. As best as can be made out from the numerous motions in two concurrent proceedings, plaintiff really seeks to appeal from my order dated September 4, 1979, dismissing plaintiff's complaint. Plaintiff does not need leave to appeal from that order or from the judgment entered or to be entered thereon, but may appeal as of right [CPLR 5701(a)].

It is not clear which determination plaintiff seeks to appeal in motions 158, 159 and 160 although it appears to be my order of October 12, 1979. That, however, is based on the prior order dated September 4, 1979 dismissing the complaint. For this appeal, as stated before, plaintiff does not require leave. If plaintiff seeks leave to appeal from my order of October 15, 1979 [under index 12669/79] there he

may do so without leave [if judgment has been entered]. [CPLR 5701].

The motions are, accordingly, denied.

Dated: January 22, 1980 /s/ M.B.S. J.S.C.

APPENDIX - E

Judgment Dismissing Proceeding Except Portion Concerning Medical Malpractice, Entered 12/5/79

AT A SPECIAL TERM, PART I, OF THE SUPREME COURT OF THE STATE OF NEW YORK, HELD IN THE COUNTY OF NEW YORK, AT THE COUNTY COURT HOUSE THEREOF ON THE 5th DAY OF DECEMBER 1979
PRESENT:
Hon. Martin B. Stecher
Justice

In the Matter of the Application of
ROBERT BORIS BEACHBOARD,
Petitioner,
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules
-against-
COLUMBIA UNIVERSITY,
Respondent.

Index No. 12669/79

ORDER/
JUDGMENT

The application in the above entitled proceeding brought by petitioner appearing pro se pursuant to Article 78 of the Civil Practice Law and Rules for a judgment

directing the respondent to enroll petitioner in a certified degree program in its Graduate School, compelling the respondent to change a grade given to petitioner, directing the respondent to provide petitioner with a letter of reference, damages for medical malpractice, etc. having duly come on to be heard before Mr. Justice Martin B. Stecher at a Special Term, Part I of this Court on the 26th day of September, 1979;

On reading and filing the order to show cause dated September 21, 1979, the petition verified September 21, 1979, and exhibits annexed thereto in support of the petition, and the affirmation of Byron Golden dated September 25, 1979 in opposition to the petition herein, and petitioner having appeared pro se herein, and Byron Golden, Esq. having appeared for respondent herein, and due deliberation having been had, and upon the opinion of

the Court, dated October 15, 1979,

Now, on motion of Byron Golden, attorney for the respondent, it is hereby

ORDERED, ADJUDGED AND DECREED that except with respect to petitioner's claim alleging medical malpractice, petitioner's application is denied and the proceeding is dismissed, and it is further

ORDERED, that petitioner's claim alleging medical malpractice is hereby severed and this proceeding is hereby converted into a cause of action at law, and it is further

ORDERED, that petitioner shall serve an amended complaint limited to the medical malpractice cause of action within thirty (30) days after service of notice of entry of this judgment.

E N T E R ,

/s/ M.B.S.
Justice, Supreme Court

APPENDIX - F

Decision Denying Permission to Amend Petition, Entered 10/18/79

SUPREME COURT : COUNTY OF NEW YORK
SPECIAL TERM : PART I

In the matter of the application of ROBERT BORIS BEACHBOARD,
Petitioner,
for a judgment pursuant to Article 78 of the CPLR
-against-
COLUMBIA UNIVERSITY,
Respondent.

Index 12669/79

STECHER, J.:

Motions #28, 47, 83, 84, 168, 169, 170, 171, 172 and 173 of the September 10, 1979 calendar are consolidated for purposes of disposition. #28 seeks to compel discovery and inspection; #47 seeks discovery and inspection; #83 is an Article 78 proceeding seeking changes in respondent's application and registration forms; #84 seeks an order directing respondent to supply petitioner

with certain letters of reference; #168 seeks dismissal of petitioner's cross-motion for a protective order; #169 is a motion for leave to withdraw a motion for leave to serve a supplemental complaint; #170 is a motion for leave to serve a supplemental complaint, which complaint is apparently also the subject matter of motions #169 and 170; #171 is an Article 78 proceeding seeking the admission of petitioner to a certified degree program in respondent's graduate school of arts and sciences; #172 is a motion seeking leave to withdraw all prior motions; and #173 is an Article 78 proceeding seeking disclosure and admission to respondent's graduate school of arts and sciences.

Petitioner's motions, insofar as they have not been withdrawn, are denied. By a prior order in this proceeding, dated September 4, 1979, the complaint herein

was dismissed, as well as petitioner's motion to amend to state a cause of action pursuant to Article 78. Accordingly, all subsequent motions in this proceeding are moot.

Dated: October 12, 1979 /s/ M.B.S. J.S.C.

APPENDIX - G

Decision Dismissing Proceeding and Denying all Motions Entered 10/15/79

SUPREME COURT : COUNTY OF NEW YORK
SPECIAL TERM : PART I

In the matter of the application of
ROBERT BORIS BEACHBOARD,
Petitioner,
for a judgment pursuant to Article 78 of the CPLR
-against-
COLUMBIA UNIVERSITY,
Respondent.

Index 12669/79

STECHER, J.:

Petitioner, appearing pro se, moves for various relief in this Article 78 proceeding. Among other relief petitioner seeks an order directing respondent to enroll petitioner in a certified degree program in its graduate school of arts & sciences; compelling respondent to change a grade given to petitioner in a course in respondent's school of general studies;

cancelling a bill of $71.83 for residence hall expenses; and, for damages in the amount of $50,000. This petition seeks basically the same relief sought by petitioner in a prior action, which was dismissed as being untimely.

Petitioner again alleges that his rejection by respondent for admission (in 1979) to respondent's graduate school of arts & sciences was an abuse of discretion and discriminating. An Article 78 proceeding must be brought within four months of the final decision denying petitioner admission to the graduate school [CPLR 217]. Petitioner was informed, in 1978, that no further applications by petitioner for admission would be considered. Petitioner cannot avoid the statute of limitations by renewing the same application each year. All other claims of petitioner which seek relief in the nature of mandamus are also denied.

In order to be successful in such a proceeding as the one herein, petitioner must establish that respondent's actions were arbitrary or capricious. This he has been unable to do. "A court should refrain from interjecting its views within those delicate areas of school administration which relate to the eligibility of applicants and the determination of marking standards, unless a clear abuse of statutory authority or a practice of discrimination or gross error has been shown." [In Re Lesser (Board of Education of the City of New York), 18 AD 2d, 388,391]. Petitioner has shown no arbitrary, unfair or unreasonable conduct by respondent in denying him admission, nor has he shown any right to the references requested. Clearly, it is not within the power of respondent to require members of its faculty to give

letters of reference.

Petitioner's only claim which appears not to be time barred is his claim alleging medical malpractice. That is a cause of action at law and not an Article 78 proceeding. The cause of action is severed from the remaining causes of action; is converted into a cause of action at law [CPLR 103(c)]; and the petitioner shall serve an amended complaint limited to that cause of action within 30 days after service of a judgment herein.

Settle judgment consistent with the foregoing.

Dated: October 15, 1979 /s/ M.B.S. J.S.C.

APPENDIX - H

Decision Denying Discovery Motion, Entered 10/15/79

SUPREME COURT : COUNTY OF NEW YORK
SPECIAL TERM : PART I

In the matter of the application of
ROBERT BORIS BEACHBOARD, :
Petitioner,
for a judgment pursuant to Article 78 of: the CPLR
-against- :
COLUMBIA UNIVERSITY,
Respondent. :

Index 12669/79

STECHER, J.:

Petitioner's motion to compel discovery and inspection is denied. The proceeding underlying this motion has been dismissed. There being no pending action, there can be no discovery.

Dated: October 12, 1979 /s/ M.B.S. J.S.C.

APPENDIX - I

Order Denying Motion to Vacate Order Entered 9/16/80, Entered 11/25/80

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of November A. D. 1980

Present, Hon. Lawrence H. Cooke, Chief Judge, presiding.

Mo. No. 1161

In the Matter of Robert Boris Beachboard,

Appellant,

vs.

Columbia University,

Respondent.

A motion having heretofore been made upon the part of the appellant to vacate this Court's order of dismissal dated September 16, 1980, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

SEAL

/s/
Joseph W. Bellacosa
Clerk of the Court

APPENDIX - J

Notice of Appeal, 12/23/80

COURT OF APPEALS OF THE
STATE OF NEW YORK

In the Matter of the Application of
ROBERT BORIS BEACHBOARD,
Petitioner-
Appellant,

For a Judgment Pursuant to Article
78 of the Civil Practice Law and
Rules -against-
COLUMBIA UNIVERSITY,
Respondent-
Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Robert Boris Beachboard, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final decision of the Court of Appeals of the State of New York denying the motion of the appellant made on November 10, 1980 to vacate the Court's order of dismissal dated September 16, 1980.

This appeal is taken pursuant to 28

USC § 1257 (2).

/s/

Robert Boris Beachboard
611 West 112th Street
New York, New York
10025

Dated: December 23, 1980

PROOF OF SERVICE

I, Robert Boris Beachboard, appellant herein, hereby certify that on the twenty-third day of December, 1980. I served a copy of the foregoing "Notice of Appeal to the Supreme Court of the United States" on Columbia University, respondent herein, by mailing a copy in a duly addressed envelope, with postage prepaid to Byron Golden, attorney for respondent, at his office in 11 East 44th Street, New York, New York 10017.

/s/

Robert Boris Beachboard

Subscribed and sworn to before me this 23rd day of December, 1980.

/s/ Kenneth T. Vorisek
Notary Public
State of New York
County of New York